DARUMALINGAM SINNIAH v.
ASIAN SHIELD WAREHOUSING SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: B-02-2210-2011]
10 AUGUST 2015

CIVIL PROCEDURE: *Trial – Procedure – Witness statement – Whether examination-in-chief of witness in action begun by writ must be by way of witness statement – Whether witness statement to be read out by witness himself – Counsel allowed to read out witness statement and answers – Whether there was a serious procedural flaw – Whether curable – Whether trial rendered a nullity – Rules of the High Court 1980, O. 35A r. 1*

The plaintiff claimed against the defendant in the High Court for breach of contract arising from a friendly loan agreement between the plaintiff and the defendant, whereas, the defendant counter claimed against the plaintiff for the return of the interest sum imposed on the friendly loan. At the conclusion of the trial, the Judicial Commissioner ('the JC') dismissed the plaintiff's claim as well as the defendant's counter claim. The plaintiff appealed against the decision of the JC. The defendant however, did not appeal against the dismissal of its counter claim. At the outset of the hearing in the Court of Appeal, it was observed that all the questions and answers in every witness statement were read out by the respective counsel at the trial, and not by the witness concerned. All that each of the witnesses did was to merely affirm and sign the respective witness statement. In fact, the respective counsel at the trial had also read out the answers on behalf of the witnesses.

Held (allowing appeal with no order as to costs)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) Order 35A r. 1 of the Rules of the High Court 1980 ('RHC') deals with the procedure to be complied by a court in order to admit a witness statement. Order 35A r. 1 of the RHC makes it clear that the examination-in-chief of a witness in an action begun by writ must be by way of a witness statement, unless the court otherwise directs. The proper practice in reading out a witness statement at trial is by having the questions and answers in the witness statement read out by the witness himself; or by having the questions in the witness statement read out by counsel and the answers thereto to be read out aloud by the witness. A counsel cannot be the one reading out both the questions and answers. (paras 15 & 17)

(2) The JC had fallen into a serious procedural flaw in the conduct of the trial when counsel was allowed to read out both the questions and answers in the witness statements of the witnesses, instead of having the questions and answers read out by the witnesses themselves; or, instead of having counsel reading out the questions and the witnesses reading out the answers. This had gone against the wording and spirit of O. 35A r. 1 of the RHC. (paras 14 & 19)

(3) Based on the notes of evidence, there was neither any application nor any order made by the JC to the effect that the answers in the witness statements were to be read out by counsel. In any event, the JC could not make such an order that would be contrary to the spirit of the provision, except, in exceptional circumstances. (para 20)

(4) There was a mistrial by the JC as there was serious non-compliance of a mandatory procedural rule. The irregularity at the High Court could not be cured by the fact that the respective witnesses affirmed and signed their witness statements. The trial was therefore declared a nullity. The matter was ordered to be remitted to the High Court with the view that it be re-tried before another judge. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif menuntut terhadap defendan di Mahkamah Tinggi bagi kemungkiran kontrak akibat daripada perjanjian pinjaman persahabatan antara plaintif dan defendan, manakala, defendan menuntut balas terhadap plaintif bagi pemulangan jumlah faedah yang dikenakan terhadap pinjaman persahabatan tersebut. Di akhir perbicaraan, Pesuruhjaya Kehakiman ('PK') menolak tuntutan plaintif dan tuntutan balas defendan. Plaintif merayu terhadap keputusan PK. Walau bagaimanapun, defendan tidak merayu terhadap penolakan tuntutan balasnya. Di permulaan perbicaraan di Mahkamah Rayuan, didapati bahawa kesemua soalan dan jawapan dalam setiap kenyataan saksi dibacakan oleh peguam masing-masing semasa perbicaraan, dan bukan oleh saksi yang berkenaan. Setiap saksi hanya mengesahkan dan menandatangani kenyataan saksi masing-masing. Malahan, semasa perbicaraan peguam masing-masing juga telah membacakan jawapan-jawapan bagi pihak saksi-saksi.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Aturan 35A k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah berkaitan dengan prosedur yang perlu dipatuhi oleh mahkamah untuk menerima kenyataan saksi. Aturan 35A k. 1 KMT jelas memperuntukkan bahawa pemeriksaan utama seseorang saksi dalam sesuatu tindakan yang dimulakan dengan writ mestilah melalui kenyataan saksi, kecuali mahkamah memerintahkan sebaliknya. Amalan yang sewajarnya dalam membacakan kenyataan saksi dalam perbicaraan

adalah dengan cara, soalan-soalan dan jawapan-jawapan dalam kenyataan saksi dibacakan oleh saksi itu sendiri; atau dengan cara, soalan-soalan dalam kenyataan saksi dibacakan oleh peguam dan jawapan-jawapan kepadanya dibacakan dengan kuat oleh saksi. Seseorang peguam tidak boleh membacakan kedua-dua soalan dan jawapannya sekali.

(2) PK telah melakukan kecacatan prosedur yang serius dalam penjalanan perbicaraan apabila peguam dibenarkan membacakan kedua-dua soalan dan jawapan dalam kenyataan saksi oleh saksi-saksi, dan bukan menyuruh soalan-soalan dan jawapan-jawapan dibacakan oleh saksi-saksi sendiri; atau sebaliknya menyuruh peguam membacakan soalan-soalan dan saksi-saksi membacakan jawapan-jawapan. Perkara ini adalah bertentangan dengan peruntukan dan niat A. 35A k. 1 KMT.

(3) Berdasarkan nota-nota keterangan, tidak ada apa-apa permohonan atau apa-apa perintah yang dibuat oleh PK yang membolehkan jawapan-jawapan dalam kenyataan saksi dibacakan oleh peguam. Dalam apa jua keadaan, PK tidak boleh membuat perintah sedemikian yang bertentangan dengan niat peruntukan tersebut, kecuali dalam hal keadaan yang istimewa.

(4) Perbicaraan silap telah dilakukan oleh PK kerana terdapat ketidakpatuhan serius terhadap kaedah prosedur. Kecacatan di Mahkamah Tinggi tidak boleh dipulihkan oleh fakta bahawa saksi masing-masing telah mengesahkan dan menandatangani kenyataan saksi mereka. Perbicaraan tersebut oleh itu diisytiharkan tidak sah. Perkara tersebut diperintahkan untuk dikembalikan kepada Mahkamah Tinggi supaya ia dibicarakan semula di hadapan hakim yang lain.

Legislation referred to:
Rules of the High Court 1980, O. 35A r. 1

For the appellant - N Subramaniyan (Palani with him); M/s Subramaniyan
For the respondent - Rosli Ahmad; SFC

[Appeal from High Court, Shah Alam; Civil Suit No. 22-867-2007]

Reported by S Barathi

JUDGMENT

Mohd Hishamudin Yunus JCA:

[1] The appeal before us is from the High Court of Shah Alam, in respect of Shah Alam High Court Civil Suit No. 22-867-2007.

[2] The appeal is by the plaintiff (the appellant before us) against the decision of the learned Judicial Commissioner (as she then was) of 8 August 2011 dismissing the plaintiff's claim against the defendant (the respondent before us).

[3] The appeal came before us on 5 May 2015. We allowed the appeal on the sole ground that there was a mistrial at the High Court. We declared the trial a nullity and ordered that the matter be remitted to the High Court for it to be retried before another judge.

[4] We now give our reasons for allowing the appeal.

[5] However, before that, we shall state briefly the facts of the case.

[6] The plaintiff's claim in the High Court against the defendant was for a breach of contract arising from a friendly loan agreement between the plaintiff and the defendant. The plaintiff alleges that he had given a loan of RM1,144,953.10 to the defendant. Of the said sum, only RM299,773.66 was repaid, thus leaving a balance of RM845,179.50 still unpaid (the sum claimed by the plaintiff in the statement of claim).

[7] The defendant denies the plaintiff's claim and alleges that only RM380,000 was borrowed from the plaintiff. The defendant's witness, its Chief Executive Officer (DW1), testified that the whole loan had been repaid in full to the plaintiff, together with interest amounting to RM108,691.66, as demanded by the plaintiff. It is the defendant's pleaded case that at the material time, it was unaware that it was illegal to impose interest on friendly loans. As such, the defendant files a counterclaim against the plaintiff for the return of the interest sum of RM108,691.66.

[8] At the conclusion of the trial, the learned Judicial Commissioner dismissed the plaintiff's claim as well as the defendant's counterclaim.

[9] Dissatisfied with the decision of the learned Judicial Commissioner, the plaintiff filed a notice of appeal. The defendant did not appeal against the dismissal of its counterclaim. Hence the appeal before us is only against the dismissal of the plaintiff's claim by the High Court.

[10] After the trial and before the appeal could be heard before us, the defendant was wound up on 1 March 2013. As such, the learned Senior Federal Counsel on behalf of the Director General of Insolvency represented the defendant at the hearing of this appeal.

[11] On the outset of the hearing before us, we observed from the notes of evidence of the High Court that all the questions and answers in every witness statement were read out by the respective counsel at the trial and not by the witness concerned. All that each of the witnesses did was to merely affirm and sign the respective witness statement. We found this rather peculiar and upon inquiring about this procedure (as appears to have been followed) from counsel of both the plaintiff and defendant, they confirmed that the respective counsel at the trial had indeed not just read out the questions in the witness statement, but had also read out the answers on behalf of the witnesses.

[12] For ease of reference, we reproduce below the relevant portion of the notes of evidence of the High Court as an example: A

> Dalam Mahkamah Terbuka
>
> Di hadapan: Pesuruhjaya Kehakiman Y.A. Datuk Nor Bee binti Ariffin
>
> Bertarikh: 22.6.2011 B
>
> Masa: 10.35 pagi
>
> En Abdul Kadir Ismail bagi pihak Plaintif.
>
> Encik Kanarasan bagi pihak Defendan. Hadir bersama beliau PDK Cik Malathi Natarajan. C
>
> Mahkamah: ...
>
> Pemeriksaan Utama:
>
> Tuan Haji Kadir membaca Q&A Witness Statement SP1.
>
> ... D
>
> Tuan Hj. Kadir selesai membaca Witness Statement SP1.
>
> SP1 mengesahkan dan menandatangani Witness Statement beliau.
>
> Mahkamah: Witness Statement SP1 sebagai WS1.

[13] We note with dismay that this procedure (wherein counsel read out both the questions and answers in the witness statement on behalf of the witnesses) was consistently followed throughout the whole trial for all four of the plaintiff's witnesses and the sole defendant's witness. E

[14] With respect, we find that the learned Judicial Commissioner had fallen into a serious procedural flaw in the conduct of the trial when she allowed counsel to read out both the questions and answers in the witness statements of witnesses, instead of having the questions and answers read out by the witnesses themselves; or, instead of having counsel reading out the questions and the witnesses reading out the answers. F

[15] Order 35A r. 1 of the Rules of the High Court 1980 (which has since been repealed by the Rules of Court 2012) deals with the procedure to be complied by a court in order to admit a witness statement. Order 35A r. 1 of the Rules of the High Court 1980 (the RHC 1980) reads as follows: G

> Witness Statement H
>
> 1. Unless otherwise ordered by the Court, any witness in an action commenced by writ shall give his evidence-in-chief by way of witness statement, in the form of question and answer, tendered and read at the hearing before the witness is cross-examined on his witness statement.

[16] The present case is a writ action and at the material time the RHC 1980 applies. I

[17] Order 35A r. 1 of the RHC 1980 above makes it clear that the examination-in-chief of a witness in an action begun by writ must be by way of a witness statement, unless the court otherwise directs. For instance, the evidence can be given orally by the witness if so ordered by the court. Further, the above provision lays down the format of the witness statement, in that it must be in the form of questions and answers. This is immediately followed by the words "tendered and read at the hearing". Order 35A r. 1 makes it crystal clear that the witness statement must be tendered and read out by the witness himself. We are of the view that the proper practice in reading out a witness statement at trial is by having the questions and answers in the witness statement read out by the witness himself; or by having the questions in the witness statement read out by counsel and the answers thereto to be read out aloud by the witness. A counsel cannot be the one reading out both the questions and answers.

[18] In the present case, that is exactly what happened, wherein, not only did counsel read out the questions in the witness statements, but proceeded also to read out the answers on behalf of the witness.

[19] This, in our opinion, goes against the wording and spirit of O. 35A r. 1 of the RHC 1980. Since it is the witness who is giving the evidence, it is only logical that the answers should come from the witness and no one else.

[20] Learned counsel for the plaintiff, however, submits that there is the discretion on the part of the learned Judicial Commissioner conducting the trial to allow the reading out of the answers in the witness statements by counsel, as what had happened during the trial, by reason of the words "Unless otherwise ordered by the court, ..." in O. 35A r. 1 of the RHC 1980. With respect, we are unable to accept this argument. Firstly, based on the notes of evidence, there was neither any application nor any order made by the learned Judicial Commissioner to the effect that the answers in the witness statements were to be read out by counsel. Secondly, in any case, we do not think that the learned Judicial Commissioner could make such an order that would be contrary to the spirit of the provision; except, perhaps, in exceptional circumstances, where for example, there is medical evidence that a particular witness is unable to speak at the trial.

[21] In the course of hearing submissions, we invited learned counsel for the plaintiff and defendant to submit on whether the above procedural non-compliance could be cured by the fact that the witnesses had, at the end of the reading out of the witness statements by counsel, affirmed and signed their respective witness statements. Both counsel answered in the negative.

[22] For the above reasons, we are impelled to hold that there was a mistrial by the learned Judicial Commissioner as there was serious non-compliance of a mandatory procedural rule at the High Court, namely,

of O. 35A r. 1 of the Rules of the High Court 1980. We are in agreement with learned counsel of both parties that the irregularity at the High Court cannot be cured by the fact that the respective witnesses affirmed and signed their witness statements.

[23] We therefore declare that the trial by the High Court is a nullity; and we make an order for the matter to be remitted to the High Court with the view that it be retried before another judge.

[24] Accordingly, we allow the appeal with no order as to costs. The deposit is to be refunded to the plaintiff.

Appeal is allowed with no order as to costs.